IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1128 of 1994

For Approval and Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHIMANBHAI LALJIBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1128 of 1994
MR VIJAY H PATEL for Petitioner No. 1-4
MR MM JADEJA for Petitioner No. 1-4
MR ND GOHIL, APP, for Respondent

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 11/06/2003

ORAL JUDGEMENT

(Per : ACTING CHIEF JUSTICE MR.JN BHATT)

By way of this appeal under section 374 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short), the appellants, original accused Nos.1, 3, 7 & 11 have challenged the conviction and sentence recorded by the learned Additional Sessions Judge, Navsari in Sessions Case No.23/91, by which the appellants, original accused Nos.1, 3, 7 & 11 came to be convicted for the offence punishable under section 302 read with 114 of the Indian Penal Code (IPC for short) and sentenced to undergo imprisonment for life and fine of Rs.200/- and in default to undergo one month's simple imprisonment, for committing murder of one Gondiabhai Devjibhai, father of the complainant, in an incident which occurred on 12.10.1990 at 6.30 a.m. at village Jogvel, Tal: Dharampur, Dist: Valsad and they also came to be convicted under section 325 read with section 114 of the IPC and sentenced to undergo rigourous imprisonment for five years and pay amount of Rs.200/- by way of fine and in default, one month's simple imprisonment. Both sentences were directed to run concurrently. The sole question which emerges and placed in focus in this appeal is as to whether the conviction and sentence of the appellants, original accused Nos.1, 3, 7 & 11 under section 302 read with section 114 and 325 read with 114 of IPC would stand the judicial scrutiny in exercise of power under section 374 of the Cr.P.C., to which we hasten to discuss and adjudicate upon, hereinafter, after considering the factual matrix, giving rise to the appeal, at the instance of the appellants, original accused Nos.1, 3, 7 & 11 out of the 14 accused persons arraigned in Sessions Case before the Trial Court.

It would be appropriate to mention, at this stage, that in so far as involvement of appellants in the incident of 12.10.90 is concerned, the same is not seriously disputed. In other words, except the provisions of law under which the conviction and quantum of sentence could be justified, the culpability for having remained present and participated in the unfortunate incident which occurred on 12.10.90 at 6.30 a.m. has not ben controverted and pressed. Still, however, for the satisfaction of the judicial conscience, we have threadbare examined the documentary as well as vivo voce evidence, the impugned judgment and the submissions raised on behalf of both the sides and the relevant and material legal settings, in general, and the provisions of section 302, 325 and 114 of the IPC in particular.

Homicidal death of Gondiabhai Devjibhai on account of injuries sustained in the incident which occurred at about 6.30 a.m. on 12.10.1990 is, rightly, not disputed. Otherwise also, it is materially and substantially borne out from the record in general and the evidence of the Medical Officer of Dr.Dhananjay N. Patel (PW-1), Ex.19, Dr.M.N.Desai (PW-9), Ex.48, Dr.Bipinchandra L. Sakiwala (PW-15), Ex.60, Post Mortem Report (Ex.63), Inquest report and other supporting circumstances that the homicidal death of deceased Gondiabhai Devjibhai has been established by an unimpeachable evidence on record.

The only question which would arise now and requires our adjudication is as to whether the conviction of the appellants under section 302 read with section 114 and under section 325 read with section 114 which is under challenge could be said to be justified or not. To substantiate the charge framed by the Sessions Court, following 15 witnesses were examined by the prosecution:

PW No.	Names	Ex. Nos.
1.	Dr.Dhananjay Naranbhai Patel	19
2.	Chhagan Ramji	27
3.	Indubhai Godiyabhai (complainant)	29
4.	Nirruddin Sirajuddin	30
5.	Nazir Mohmad Fakir Mohmad	31
6.	Shantaben Indubhai	45
7.	Dhavlubhai Godiyabhai	46
8.	Daji Mangal	47
9.	Dr.Mitesh N. Desai	48
10.	Chandu Godiya	52
11.	Poslu Mangal	53
12.	Janubhai Koldhubhai	54
13.	Takhatsinh Ramsinh	55
14.	Mohmad Khali A. Chauhan (PI)	56
15.	Dr.Bipinchandra L. Sakiwala	60

The prosecution has, also, relied upon the following documentary evidence:

Ex.No.	Particulars
1	Charge
16	Muddamal List
20	Medical certificate of Daji Mangal
21	Medical certificate of Chandu Gondia
22	Medical certificate of Indu Gondia
24	Medical certificate of Dhavlu Godiya
25	Medical certificate of Gondiya Devji (deceased).

26 Poslu Mangla
28 Map of scene of offence
32 Panchnama of scene of offence.
33 Inquest Panchnama.
34 Panchnama of body of Chiman Lalji with discovery of stick.
35 Panchnama of clothes recovered from dead of Gondia Devji.
36 Panchnama of body of Kakad Ramji with discovery panchnama of stick.
37 " " of Baban Ramji
38 " " of Lakshu Dhadu
39 " " of Ramesh Lallu
40 " " of Jamsu Jivla
41 " " of Lalji Pilya
42 " " of Raghla Pilya
43 " " of Aytul Ramji
44 " " of Uttam Raghla
49 Medical certificate of Nagin Lalji
51 Medical certificate of Lallu Zadu
57 Complaint
59 Report of Chemical Analysis.
61 Medical certificate Dadu Godiya
62 Medical certificate of Godiya Devji
63 PM Report.

It may, also, be mentioned that as per the prosecution case, ipso facto, there was a deep seated motive as there was past enmity between the two groups, accused party and the deceased party. Upon completion of investigation, 14 persons came to be charged before the learned Sessions Judge. The learned Additional Sessions Judge, upon consideration and evaluation of the evidence, convicted the appellants herein, original accused Nos.1, 3, 7 & 11 out of 14 accused persons.

It is the common contention before us that though all the 14 accused persons were armed with either stick or stones, have not acted during the course of incident cruelly, diabolically or under frenzy. The accused persons, who are appellants before us, were involved in the incident and they have used stick and also gave fist blows to deceased Gondiabhai and other injured witnesses, unquestionably, the presence cannot be doubted of the accused persons and, again, there is no reason to discard or thwart away the oral testimony of all the injured persons. The injuries sustained by the injured were not of grievous nature, which remained fully reinforced by the medical evidence and other circumstances. In fact, some of them were kept as indoor patients for three days.

The learned Sessions Judge, upon examination of the evidence on record reached to the conclusion that all the four appellants, original accused Nos.1, 3, 7 and 11 are guilty of offence punishable under section 302 and therefore, came to be sentenced under section 302 read with section 114 of the IPC. Learned Additional Sessions Judge, also, found from the record that the appellants are also guilty for the offence punishable under section 325 and passed sentence under section 325 read with 114 of the IPC for five years. We are, therefore, fully satisfied that the culpability of all the four appellants, original accused Nos.1, 3, 7 and 11 out of 14 accused, is established without any doubt.

Notwithstanding that, the main issue which is, now, in focus is as to whether the conviction under section 302 and the resultant sentence with the help of section 114 of the IPC, is justified or vulnerable or not. In so far as this issue is concerned, we have made extensive, exhaustive and elaborate meticulous examination and evaluation of evidence relied on by the prosecution and accepted by the learned Additional Sessions Judge. We have been taken through the excursion of relevant testimonies of the injured persons, who have, barring a few minor contradictions, have lent significant reinforcements to show that all the four appellants cannot escape the criminality or culpability. There is no reason to disbelieve or discard the version of the eye witnesses who are injured and whose evidence has remained unshaken and supported by medical evidence and is also inspiring confidence on the major aspects and version of the prosecution.

However, the finding of culpability and resultant punishment under section 302 read with 114 of the IPC against four accused, appellants herein, pursuant to the judgment of the learned Additional Sessions Judge, in the facts and circumstances and upon critical examination and meticulous evaluation of the evidence, in the background of the relevant proposition of law cannot be sustained. There are various reasons why the view and the ultimate conclusion recorded by the learned Sessions Judge in passing the order under section 302 read with section 114 of the IPC, against the appellants is vulnerable and in exercise of our powers under section 374 of the Cr.P.C., we would like to articulate and herald the following aspects and circumstances which would in unequivocal term militate against the view and the resultant conviction in the impugned judgment of the learned Additional Sessions Judge.

In order to bring home the culpability within the statutory parameters of section 302, the prosecution is obliged to prove that there was commission of offence of murder punishable under section 302 of the IPC. It has been laid down in number of cases by the Hon'ble Apex Court and this Court as to what are the parameters which would bring the homicidal death within the definition of murder.

Chapter XVI of IPC deals with offences affecting human body. Section 299 provides for the meaning of culpable homicide, whereas, section 300 provides for murder. Homicide is a killing of human being by human being, but it may be either (i) lawful or (ii) unlawful. Lawful homicide or simple homicide includes several cases falling under the general exceptions, whereas, unlawful homicides includes, (a) culpable homicide not amounting to murder, (b) murder and (c) suicide. Homicidal death once proved, the question will emerge as to whether it is unlawful or lawful homicide and section 300 of IPC would enter into the arena. If anyone of the exception out of five is attracted, then in that case, the culpable homicide would not be murder. Homicide which is found to be culpable homicide whether would amount to murder or not is a question to be determined and adjudicated upon in the factual profile of a given case.

The manner and mode in which the unfortunate incident occurred, is rightly not branded as a pre-planned cold-blooded or diabolic. It is, also, material to find that out of 14 accused persons who were armed with sticks and stones and four convicted persons who are appellants before us out of 14, could not be seen from the record or nothing has been spelt out which would remotely go to show that they entertained, cherished and nourished an intention to kill the deceased Gondia Devji though there was sufficient opportunity for them and had sufficient equipments with them. It is succinctly and successfully spelt out from the record supported by medical evidence that deceased Gondiabhai Devji had sustained only one serious injury resulting defused fracture which proved fatal. Of course, he had other two injuries, but they were not serious in nature.

Now, the question which would emerge is at to who is the author of the blow which proved fatal. Unfortunately, it is not clear from the evidence as to who caused this fatal blow resulting into the death of deceased Gondiabhai and whether it was caused by stick or by stone is also not clearly borne out from the record. It is

unfortunate that the said blow has cut short the life of a person aged 50. The muddamal article used and employed by A-1, appellant No.1 herein, is not proved to be the only weapon which was used and responsible for causing fatal injury.

The factual panorama emerging from the record of the case, would not even remotely lead to us hold that there was common intention as provided in section 34 of IPC or common object as provided in section 149 of IPC. Even, thereafter, it has to be shown, successfully, by the prosecution either by direct evidence or by circumstantial evidence that there was common intention or common object to kill a particular person or persons. Obviously, then overt act on the part of others may not assume substantial dimension. Here is a case where, in absence of existence of common object and common intention, the learned Sessions Judge has passed the order of conviction and sentence, which in our opinion, requires to be put in correct legal shape.

It is, therefore, apparently, clear that in absence of common intention and common object as stated hereinabove, the appellants are required to be punished for the injury or harm caused to the person individually. In our opinion, therefore, all the appellants, in absence of any other evidence as to who gave the fatal blow and with what weapon and in absence of documentary and circumstantial evidence to show the common intention or common object, are individually liable to be dealt with for the purpose of conviction and sentence.

In view of the aforesaid important aspects which have been highlighted and heralded by us from the record of the present case and after considering all the rival submissions and the entire factual profile and the relevant legal settings, we are of the opinion that presence of appellants and their involvement in the offence and the role played by them cannot be questioned. However, their conviction under section 302 read with section 114 of IPC is not supportable and not legal. It is, therefore, liable to be quashed and set aside. All the four appellants, who are original accused Nos.1, 3, 7 and 11 out of 14 accused persons, at the best can be held liable for their culpability individually for causing injuries to the injured witnesses.

Section 325 of the IPC clearly provides that if hurt or harm is caused and that too with deadly weapons, persons can be convicted for offence under the said section maximum for a period of seven years, whereas the

appellants are convicted and sentenced under section 325 read with 114 of IPC for a period of five years by the learned Additional Sessions Judge. In our opinion, the complicity and culpability of each appellant, original accused Nos.1, 3, 7 and 11 out of 14 original accused persons is established beyond reasonable doubt for the offence punishable under section 325 of the IPC for causing voluntary injuries and that too with the help of stick or stone and, therefore, they are liable to be punished under section 325 of IPC individually.

Now, the question is as to what should be the quantum of sentence under section 325 of IPC to each appellant individually. The learned Additional Sessions Judge has rightly imposed rigourous imprisonment for five years and fine of Rs.200 and in default one month's simple imprisonment. We affirm to that extent only.

For the foregoing grounds and reasons, the appeal is partly allowed. The conviction and sentence under section 302 read with section 114 of IPC against the appellants, original accused Nos.1, 3, 7 and 11 is quashed and set aside. The appellants, original accused Nos.1, 3, 7 and 11 are individually held guilty and convicted for the offence punishable under section 325 of the IPC and shall undergo sentence of rigorous imprisonment for five years and pay fine of Rs.200/- each and in default undergo one month's simple imprisonment.

It is stated by both the sides that the appellants, accused Nos.1,3, 7 & 11 have, already, undergone more than five years imprisonment as undertrial and after conviction by the learned Additional Sessions Judge. Obviously, therefore, they shall be set at liberty forthwith if not required in any other case.

Direct service is permitted."

(J.N.Bhatt, Actg. CJ)

(vjn) (A.K.Kapadia, J.)